

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 4-4-2007

Coram

The Honourable Mr. Justice N. PAUL VASANTHAKUMAR

W.P.No.20113, 20114, 20115, 20116, 20117 and 14603 of 2006

W.P.Nos.20113 to 20117 of 2006

Dr.P.Arumugham ... Petitioner in all WPs

Vs.

1. The State of Tamil Nadu,
by its Secretary,
Health & Family Welfare Department,
Madras - 9.
 2. State of Tamil Nadu,
by its Secretary,
Labour & Employment Department,
Fort St. George,
Madras - 9.
 3. The Director of Medical &
Rural Health Services,
Madras - 6.
 4. The Joint Director of Health Services,
Trichy.
 5. The Regional Administrative Medical officer,
(ESI Scheme),
Salem - 4.
- ... Respondents in all WPs

These writ petitions came to be numbered under Article 226 of Constitution of India, by way of transfer of O.A.Nos.2023, 2024, 2025, 2026 and 2027 of 1994, from the file of Tamil Nadu Administrative Tribunal, with a prayer to call for the records relating to the orders passed by the first respondent in his proceedings dated 20.11.1989, 19.4.1988, 11.9.1987, 8.9.1988 and 26.11.1988 respectively and quash the same.

W.P.No.14603 of 2006

Dr.P.Arumugham

...

Petitioner

Vs.

1. The State of Tamil Nadu,
by its Secretary,
Health & Family Welfare Department,
Fort St.George,
Madras - 600 009.

2. The Director of Medical &
Rural Health Services,
Madras - 600 006.

...

Respondents

This writ petition came to be numbered under Article 226 of Constitution of India, by way of transfer of O.A.No.5603 of 1994 from the file of Tamil Nadu Administrative Tribunal, with a prayer to call for the records relating to the order passed by the first respondent in G.O.(D)No.743 Health & Family Welfare Department, dated 6.9.1994 and quash the same.

For Petitioner in all the : Mr.C.Selvaraju,
writ petitions Senior Counsel
for Mr.A.Thirumurthy

For Respondents in all the : Mr.K.Balakrishnan,
writ petitions Addl.Govt.Pleader

COMMON ORDER

Prayer in W.P.Nos.20113 to 20117 of 2006 are to quash the order of punishment of stoppage of increment for the varied period of 6 months to 2 years, without cumulative effect.

2. In W.P.No.14603 of 2006, petitioner seeks to quash G.O.(D) No.743 Health & Family Welfare Department, dated 6.9.1994.

3. Petitioner in all these writ petitions are same and he is challenging different orders passed by the third respondent imposing punishment of stoppage of increments ranging from 6 months to 2 years, without cumulative effect.

4. The brief facts necessary for the disposal of the writ petition are as follows.

(a) Petitioner joined in service as Assistant Surgeon in Government Medical Service and he was posted in Government Primary

Health Centre in the year 1973 and he worked in various places. Petitioner was transferred in the year 1985 to ESI Wing and when the applications were filed before the Tribunal, he was working as Senior Assistant Surgeon, Government ESI Dispensary at Salem.

(b) While the petitioner was working as Assistant Surgeon at Karur, there were more than 3250 insured persons attached to the ESI Dispensary at Karur, where only two Doctors were functioning. The third respondent framed five separate charges under Rule 17(a) of the Tamil Nadu Civil Services (Classification and Appeal) Rules, against the petitioner and some other Medical Officers stating that the Insurance Medical Officers had issued certificates to the Insured Persons much more than the national average of ten certificates a day and hence the petitioner and other Medical Officers said to have violated the instructions and have issued certificates.

(c) Five charge memos were issued for different periods under Rule 17(a) of the Tamil Nadu Civil Services (Classification and Appeal) Rules. Petitioner submitted a detailed explanation to all the five charge memos and stated that fixation of the national average is only a data based on the issuance of certificates in different regions and it cannot be taken as a ground for taking disciplinary action. It was also pointed out that no one can predict how many persons will become sick and it depends on various factors and therefore the issuance of certificates cannot be restricted and the Medical Officers attached to ESI Dispensaries after examination of the patients cannot say that they would not issue certificates in genuine and deserving cases. If certificates are not issued to genuine and deserving patients, the Medical Officer will be failing in duties in their discharge of noble profession.

(d) It is further pointed out that the charge memos nowhere state that the certificates issued are not genuine and the same were issued without actually examining the patients. In Karur Hospital jurisdiction, there were 3250 insured persons and some of the Medical Officers were on deputation and some were on leave and the entire dispensary was looked after by the petitioner alone, which necessitated issuance of more number of certificates in his name.

(e) It is further pointed out in the explanation that in some cases the patients were examined by the experts and the Medical expert's advised the employees to take long leave and based on the said Medical Expert's advice, the Insurance Medical Officers like the petitioner were necessarily bound to give medical certificates to the said patients and in some cases illness like Tuberculosis, fracture of bone, viral fever, cancer, etc., require continuous treatment and leave which may some time extent to more than one year. Similarly there were seasonal diseases like bronchitis, asthma, dysentery, conjunctivitis, etc., which require the Medical Officers to issue leave certificates to the insured persons. The third respondent without considering the explanation submitted, in a proper perspective, imposed punishments of withholding of increments

without cumulative effect by passing five separate orders for different periods.

(f) It is also contended that no opportunity of hearing was given to the petitioner to explain in person, the necessity for issuing Medical Certificates by the petitioner over and above the national average and therefore the principles of natural justice is violated. The petitioner having aggrieved over the order of punishment imposed by the third respondent preferred five different appeals before the first respondent as early as on 29.11.1990 and no order having been passed petitioner filed O.A.No.6914 of 1993 and the State Administrative Tribunal by order dated 10.11.1993 directed the first respondent to dispose of the said appeals within two months i.e., from 10.11.1993. In spite of the said directions issued, the first respondent failed to pass any orders in the appeal and therefore the petitioner challenged the order of punishment in five separate original applications, which are now transferred and numbered as above writ petitions.

(g) The said punishments are challenged on the ground that the third respondent failed to follow Rule 24, sub-rule 3(a) of the Fundamental Rules and not stated as to whether withholding of increment will have any effect on the petitioner's pension. The impugned orders were passed without considering the explanation submitted by the petitioner and therefore third respondent has not applied his mind. The third respondent has not followed the principles of natural justice by supplying the questionnaire form and ought to have given an opportunity to explain petitioner's case before passing the order and as such the order passed is in violation of the principles of natural justice and the charges were framed on presumption that the certificates issued are on the higher side than the national average, without ascertaining the fact as to whether there was necessity to issue such large number of certificates in a given time. It is also contended that there was delay in initiation of proceedings as the alleged incidents took place as early as in the years 1985 and 1986 and by awarding five punishments through five different orders, the total punishment period comes to 6 1/2 years of stoppage of increments and the same will spread even beyond petitioner's retirement as he was due to retire on 30.9.1994.

5. The respondents filed counter affidavit wherein it is stated that ESI Corporation, New Delhi, fixed the limit for issuing certificates to the insured persons per annum and the same was communicated to all the insured Medical Officers. In addition to that there are guidelines in the ESI Manuals to refer the patients as inpatients to the hospital or obtain opinion of the specialists for granting leave to the insured persons. Petitioner has not followed the procedures laid down in the ESI Manual and exceeded the limit of norms prescribed by the ESI Corporation, New Delhi, for

which disciplinary action was initiated and punishment was awarded. The petitioner on five different occasions exceeded the national average in issuing certificates and therefore he was proceeded under Rule 17(a) of the Tamil Nadu Civil Services (Classification and Appeal) Rules, and awarded the following punishments on him,

- (i) Stoppage of increment for a period of one year without cumulative effect (with effect from 11.9.1987)
- (ii) Stoppage of increment for a period of six months without cumulative effect (with effect from 19.4.1988)
- (iii) Stoppage of increment for a period of one year without cumulative effect (with effect from 8.9.1988)
- (iv) Stoppage of increment for a period of two years without cumulative effect (with effect from 26.11.1988)
- (v) Stoppage of increment for a period of two years without cumulative effect (with effect from 20.11.1989).

The five different occasions were from 1987 to 1989. It is further stated in the counter affidavit that after observing all the formalities, punishments have been imposed and punishments were given according to the gravity of each charge. The petitioner was given show cause notice with regard to the charge memos and only after receiving and considering the explanation, order of punishments were imposed stating the above reasons respondents submitted that there is no merit in the original applications.

6. The learned Senior Counsel appearing for the petitioners in all these petitions submitted that the charges themselves are not maintainable in view of the fact that there is no motive attributed for issuing higher number of certificates than the national average. Petitioner also not violated the ESI Medical Manual regarding the guidelines for issuing Lax certification and the petitioner submitted explanation stating that there were more than 3250 employees and the petitioner was the sole Doctor available at that time and therefore he was compelled to issue more number of certificates and that the national average is only approximate calculation, which depends upon place to place, season to season and merely because the certificates issued are more than national average, no charge can be framed, particularly when no motive is attributed in any one of the charge memos. The learned Senior counsel also submitted that the explanation submitted by the petitioner stating all the above reasons were not considered by the third respondent while ordering punishments and the petitioner has also retired from service in the year 1994 and by virtue of the five punishments imposed, that is, withholding of increment for a total period of 6 1/2 years in petitioners total service is very severe. Therefore the learned senior counsel prayed for allowing the writ petitions.

7. The learned Additional Government Pleader appearing on behalf of the respondents, on the basis of the averments contained in the counter affidavit submitted that the petitioner was proceeded

as he has issued more number of certificates to the insured persons than the national average and the same is in violation of the ESI Medical Manual and the explanation submitted by the petitioner was considered and lenient punishment is imposed and the said punishment need not be interefered with.

8. I have considered the submissions made by the learned Senior counsel for the petitioner as well as the learned Additional Government Pleader for the respondents.

9. The point in issue is whether the framing of charges under Rule 17(a) against the petitioner for issuing more number of certificates than the national average of 10 certificates per day in different periods is maintainable and sustainable.

10. Petitioner in his explanation has submitted reasons as to why he was compelled to issue more number of certificates than the national average by stating that there were 3250 insured persons attached to the ESI dispensary at Karur and only two doctors were actually looking after them and that the other Medical Officer was on deputation and on leave for some days and therefore the entire duty was looked after by the petitioner, which resulted in issuance of more number of certificats than the national average. In view of the said explanation submitted it has to be ascertained as to whether the petitioner has violated any of the conditions mentioned in ESI Medical Manual while issuing certificates.

11. Clause 83(1) to (6) deals with issuance of certificates for sickness benefit and the same is extracted hereunder,

"83.1 While issuing certificates for Sickness Benefit, the definition of the term 'Sickness' as described in Section 2(2) of the E.S.I.Act must be kept in mind. Under this Section 'Sickness' means a condition which requires medical treatment and attendance and necessitates abstention from work on medical grounds. This definition enjoins that before a Sickness Certificate can be issued, two conditions must be satisfied, namely (i) that a person requires medical treatment and attendance and (ii) that his condition necessitates abstention from work on medical grounds. This needs a little clarification for the guidance of the I.M.Os./I.M.Ps. There may be cases who require medical treatment and attendance and ot abstention from work, e.g., cases of simple diseases like a small abrasion. There may be cases who require abstention from work, but not medical treatment and attendance, e.g., cases of

such diseases where no treatment is indicated or is possible. Thus, it is clear that both these conditions must be satisfied before issuing a medical certificate. As this is the language of Forms 8,9,10,11, these conditions apply when issuing certificates for E.I. cases also.

83.2 While it is essential that every I.P. who is genuinely sick must receive medical certificate, it is equally important that no certificate should be issued to an I.P. who is actually not in need of abstention from work on medical grounds. Any laxity in the issue of certificates may not only have serious repercussions upon the financial resources of the Scheme, but may also saddle the industry, with abnormal absenteeism which adversely affects production and undermines the economy of the country. Laxity in the issue of certificates may, sometimes, arise due to acquiescence by the Doctor as a result of pressure from workers (and other interested parties) although it is also known that there are cases when conscientious Doctors have resisted successfully undue influence. Sometimes, it may be difficult to check malingering because of the fact that some I.Ps. feign vague symptoms like indigestion, nervousness, pain in some part of the body, diarrhoea, etc., which may be difficult to verify without keeping the person under prolonged observation. A cursory examination may not reveal the correct position and, if required, the Doctor would do well to check up the condition thoroughly by clinical observation and investigation or even by recommending hospitalisation. In case the Doctor is not satisfied about the genuineness of a case, it would be proper to refer the patient to the Medical Referee for opinion about necessity of abstention on medical grounds. Doubtful cases, may, sometimes, be referred to hospital for investigation. the necessity of thorough examination of each individual patient, particularly, those complaining of vague symptoms cannot be over-emphasised. The Doctor, should therefore, exercise due caution in issuing certificates so as to ensure that no certificate is issued without sufficient medical justification.

83.3 An I.P. should be regarded as needing

abstention from or incapable of work on account of some specific disease or Temporary Disablement requiring medical treatment or bodily or mental disablement of such nature that an attempt to work would be seriously prejudicial to his health.

83.4 Sometimes, a person may not be so ill or disabled as not to be able to carry out any type of work; but if he cannot perform his ordinary occupation, he should be certified as needing abstention from work. the inability of an I.P. to follow his ordinary occupation while in itself may not be sufficient to justify his being certified as continuing to need abstention, yet he should be regarded so, if it appears probable that it would be unreasonable to expect him to undertake another form of work in the meantime. This is the criterion while I.M.Os./I.M.Ps. should ordinarily apply while issuing certificates.

83.5 It should be clearly understood that the certificate is to be issued at the time of examination. When for any exceptional reasons the certificate cannot be issued at the time of examination, the I.M.O/I.M.P. must send the certificate to the I.P. within 24 hours thereafter.

83.6 Each certificate is to be based on a separate examination of the patient."

From the perusal of the above guidelines issued under the ESI Medical Manual for issuance of sickness certificate, it is seen that certificates can be given on two conditions that is if a person requires medical treatment and attendance and his condition necessitates abstention from work on medical grounds. It is also stated that every insured person, who is genuinely sick, must receive medical certificate. It is also equally important that no certificate shall be issued to the insured person, who is actually not in need of abstention from work on medical grounds. It is further stated that the Doctor should exercise due caution in issuing certificates so as to ensure that no certificate is issued without sufficient medical justification. It is not the case of the respondent even according to charge memos that the petitioner issued medical certificates to the insured persons, without sufficient medical justification.

12. The only basis for issuing the charge memos is that the number of certificates issued by the petitioner exceeded the national average. It is relevant to note that issuance of certificate is governed by the above referred guidelines issued in ESI Medical Manual and unless it is proved that the above guidelines

are not followed by a Doctor while issuing certificates, no charge could be framed. The national average is a data and it may vary from month to month, year to year and place to place depending on various factors. Therefore, much reliance cannot be given to the said national average and merely because the petitioner has issued certificates over and above the national average, the petitioner cannot be proceeded with by way of disciplinary action, particularly when it is the specific case of the petitioner that there are more number of insured persons in the ESI Dispensary, Karur, and there were only two doctors and out of the two Doctors, the other Doctor was on deputation and was on leave for several days.

13. In view of the non-consideration of above aspects, particularly when there is no motive attributed against the petitioner for issuing the certificate, I am of the view that the third respondent was not justified in framing the charge and imposing punishment against the petitioner. It is not the case of the third respondent that the petitioner issued certificates without sufficient medical justification. Once the same is not alleged and proved, no charge much less punishment could be imposed against the petitioner, merely because he has issued higher number of certificates than the national average. It is also the specific case of the petitioner that doubtful cases were referred to the Specialists and only based on their medical opinion and advice medical certificates were issued. Therefore the petitioner was fully justified in issuing certificates, though the same is more than the national average.

14. The reason stated in the impugned order for not accepting the explanation is mere non-acceptance, without stating as to why the same was not accepted. The other reason stated is that due to the issuance of Lax certification to the insured persons, exceeding national average, ESI Corporation was made to compensate huge amount as sickness allowance to the insured persons and due to the said reason only the impugned orders are passed. Since the petitioner has not violated the guidelines issued in the ESI Medical Manual and as no ill-motive is either alleged or proved against the petitioner for issuing more number of certificates.

15. The importance of Doctors to treat the patients is emphasised by the Honourable Supreme Court based on medical ethics and Article 21 of the Constitution of India.

(a) In the decision reported in (1989) 4 SCC 286 (PT.Parmanand Katara v. Union of India) in paragraph 8, the Honourable Supreme Court held thus,

"8. A doctor at the government hospital positioned to meet this State obligation is, therefore, duty bound to extend medical assistance for preserving life. Every doctor

whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way."

(b) The health and strength of a worker is an integral facet of right to life. In the decision reported in (1992) 1 SCC 441 (C.E.S.C.Limited v. Subhash Chandra Bose) in paragraph 32 the Honourable Supreme Court explained the term 'health' as follows,

"32. The term health implies more than an absence of sickness. Medical care and health facilities not only protect against sickness but also ensures stable manpower for economic development. Facilities of health and medical care generate devotion and dedication to give the workers' best, physically as well as mentally, in productivity. It enables the worker to enjoy the fruit of his labour, to keep him physically fit and mentally alert for leading a successful, economic, social and cultural life. The medical facilities are, therefore, part of social security and like gilt-edged security, it would yield immediate return in the increased production or at any rate reduce absenteeism on grounds of sickness, etc. Health is thus a state of complete physical, mental and social well being and not merely the absence of disease or infirmity. In the light of Articles 22 to 25 of the Universal Declaration of Human Rights, International Convention on Economic, Social and Cultural Rights, and in the light of socio-economic justice assured in our Constitution, right to health is a fundamental human right to workmen. The maintenance of health is a most imperative constitutional goal whose realisation requires interaction of many social and economic factors. Just and favourable condition of work implies to ensure safe and healthy working conditions to the workmen. The periodical medical treatment invigorates the health of the workmen and harnesses their human resources. Prevention of occupational disabilities generates devotion and dedication to duty and enthuses the

workmen to render efficient service which is a valuable asset for greater productivity to the employer and national production to the State. Yet the report of the Committee on Labour Welfare, 1969 in paragraph 5.77 of Chapter 5 reveals that, "private employers generally feel that this burden shall not be cast upon them".

(c) The object of Employees' State Insurance Act, 1948, and the right to health of workmen is explained by the Honourable Supreme Court in the decision reported in (1996) 2 SCC 682 (Killoskar Brothers Ltd v. Employees' State Insurance Corporation) in paragraph 6 of the Judgment, which reads as follows,

"6. The object of the Act is to provide certain benefits to employees in case of sickness, maternity, employment injury and for certain other matters in relation thereto. Section 39 of the Act enjoins upon the employer to make payment of contribution and deduction of the contribution of the employees from their wages at the rates specified in the First Schedule to the Act and to credit the same to their account. The employees covered under the Act in return would receive treatment for sickness, maternity, payment for employment injury etc. Every human being has the right to live and to feed himself and his dependants. Security of one's own life and livelihood is a precondition for orderliness. Liberty, equality and dignity of the person are intertwined precious rights to every citizen. Article 1 of the Universal Declaration of Human Rights, 1948 assures human sensitivity and moral responsibility of every State and that all human beings are born free and equal in dignity and rights. Article 3 assures everyone the right to life, liberty and security of person. Article 25 (1) assures that everyone has a right to a standard of living adequate for the health and well-being of himself and of his family, including, among other things, medical care, and right to security in the event of sickness, disability etc. Article 6 of International Covenant on Civil and Political Rights, 1966 assures that every human being has inherent right to life. This right shall be protected by law. Article 7(b) recognises the right of everyone for the enjoyment of just and healthy conditions of work which ensures in particular safe and healthy working conditions. The Preamble of the

Constitution of India, the Fundamental Rights and Directive Principles constituting trinity, assure to every person in a Welfare State social and economic democracy with equality of status and dignity of person. Political democracy without social and economic democracy would always remain unstable. Social democracy must become a way of life in an egalitarian social order. Economic democracy aids consolidation of social stability and smooth working of political democracy. For welfare of the employees, the employer should provide facilities and opportunities to make their life meaningful. The employer must be an equal participant in evolving and implementing welfare schemes. Article 39(e) of the Constitution enjoins upon the State to secure health and strength of the workers and directs that the operation of the law is that the citizens are not forced by economic necessity to work under forced labour or unfavourable and unconstitutional conditions of work. It should, therefore, be the duty of the State to consider that welfare measures are implemented effectively and efficaciously. Article 42, therefore, enjoins the State to make provision for just and humane conditions of work and maternity relief. Article 47 imposes a duty on the State to improve public health."

From the above cited Apex Court decisions, it is abundantly clear that no employee should be denied of medical aid.

16. An issue as to whether a charge could be framed when the Officer discharges his duty bona fide without any ill-motive, was considered by a Division Bench of this Court in the decision reported in (1999) 2 LW 174 (A.M.Sankaran v. The Registrar, High Court, Madras), wherein in paragraph 14 the Division bench held thus,

"14. Going by the principles enunciated by the Honourable Supreme Court, respondent will be justified in taking action against the petitioner if he had acted in gross recklessness in the discharge of his duties, or he failed to act honestly or in good faith, or he omitted to observe the prescribed conditions which are essential for the exercise of his statutory power. Action taken by respondent can also be justified if the respondent has a case that the petitioner has abused his power, which means that he is not acting under the Statute, but he is

going something which the Statute has not authorised. It must be misconduct, and only in such cases proceedings could be initiated."

17. In the case on hand, though medical aid is not denied, the Doctor who treated the employees was penalised for issuing of medical certificates, merely on the ground that the certificates issued are above the national average. The said attitude of the respondents, particularly when there is no allegation of violation of the guidelines issued in the ESI Medical Manual, is untenable and worthless. The manner in which the charges have been framed and the finding sought to be arrived at so as to award the punishment of withholding the increments for a total period of 6 1/2 years without cumulative effect, is not only improper, but also highly unreasonable. This kind of attitude of the Department in framing flimsy and untenable charges against honest Medical Officers will cause frustration and it will dampen their spirit in rendering medical treatment to the insured persons/patients. The impugned action initiated against the petitioner is therefore not maintainable and unsustainable and the punishment imposed are liable to be set aside.

18. In the result, W.P.Nos.20113 to 20117 of 2006 are allowed. The respondents are directed to settle the monetary benefits payable to the petitioner due to the cancellation of punishments, within three months from the date of receipt of copy of this order. No costs.

19. In W.P.No.14603 of 2006 petitioner has challenged the order of rejection of appeal, filed by the petitioner against the five punishments imposed in G.O.(D)No.743 Health and Family Welfare Department, dated 6.9.1994. Since the order of the third respondent imposing five punishments are set aside, the order passed by the first respondent rejecting the appeals filed by the petitioner on the ground that the same are filed as time barred is also liable to be set aside and consequently W.P.No.14603 of 2006 is also allowed. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

vr

To

1. The Secretary, Health & Family Welfare Department,
Madras - 9.
2. The Secretary, Labour & Employment Department,
Fort St.George, Madras - 9.
3. The Director of Medical & Rural Health Services,
Madras - 6.
4. The Joint Director of Health Services, Trichy.
5. The Regional Administrative Medical officer,
(ESI Scheme), Salem - 4.

1 cc ti /n/s. R. Shivakumar, Advocate, sr. 21655

W.P.No.20113 to 20117&14603/2006

AKR (CO)
kk 16/4



WEB COPY